

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CRIMINAL APPEAL NO.553 OF 2017
WITH
CRIMINAL APPLICATION NO.3069 OF 2021**

Azhar Abdul Pappuwale,
Age-26 years, Occupation:Labour,
R/o-Bada Gawalipura,
Taluka and District-Washim

**...APPELLANT
(Ori. Accused No.1)**

VERSUS

The State of Maharashtra

...RESPONDENTS

...
Mr. N.L. Jadhav Advocate for Appellant.
Mr. A.M. Phule, A.P.P. for Respondent-State.
...

**CORAM: SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE OF RESERVING JUDGMENT : 8th SEPTEMBER 2023

DATE OF PRONOUNCING JUDGMENT : 27th SEPTEMBER 2023

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. Present Appeal has been filed by original accused No.1
(herein after referred to as "accused" for the sake of

convenience) in Sessions Trial No.21 of 2015 to challenge his conviction under Section 302 and Section 307 of the Indian Penal Code by the learned Additional Sessions Judge, Hingoli on 16th November 2017.

2. Prosecution story, in short, is that informant Munni Yousuf Luchiwale was resident of Darva, District-Yavatmal. One Choti Dadu Manjre is her younger sister. Choti's daughter Naseem got married about eight days prior to 7th April 2015 at Washim. Munni and her daughter Shahanaz, aged 12 years, went to house of her sister Choti for the purpose of marriage of Choti's daughter. On 7th April 2015, Munni along with her daughter Shahanaz were proceeding from Washim to Garmal, Hingoli on the motorcycle driven by Dadu Bhika Manjre who was the husband of Choti. Around 9.00 to 9.30 a.m., they had covered 10 to 15 Kms. road ahead of Kanhergaon Naka towards Hingoli. At that time they found that one golden colour car was chasing them. Around 11.00 to 11.30 a.m., their motorcycle was in front of a Dhaba in Kalgaon. At that place the said car gave dash to the motorcycle on which these three persons were travelling. After the dash, those three persons fell down. Two persons alighted from the car. One was holding iron rod and another was

holding stick. Both the said persons started abusing Dadu. The person holding iron rod started saying that Dadu has committed murder of his father but Court has acquitted him and therefore he would give punishment to Dadu. Then with an intention to kill Dadu, said person gave blow of the iron rod on the head of Dadu. Another person holding stick, gave blow of stick to Dadu. At that time Dadu shouted, Azhar do not beat, Rafique do not beat (" अझर मत मार, रफिक मत मार "). When Munni tried to stop them, she was assaulted by iron rod as well as stick by both the accused on her waist, back, right and left hand. When Shahanaz started shouting, at that time the person who was holding stick, lifted Shahanaz and hit her on the ground, as a result of which there was severe injury to head of Shahanaz and blood started oozing out of the said injury. When Munni started shouting for help, both the assailants sat in the car and went towards Hingoli. People gathered at the spot. Dadu expired instantaneously. Shahanaz was unconscious and after a while Ambulance arrived at the spot and then Munni as well as Shahanaz were taken to hospital. When the First Information Report (for short "FIR") was being taken, at that time Police brought two persons in the hospital and Munni identified them to be the said persons as assailants and upon inquiry those two persons gave their names.

Dadu's brother Munna told informant that Dadu was charged with the allegation of murdering Azhar's father in the year 2005. However, Azhar was acquitted and therefore, both the accused were annoyed with Dadu. They used to give threats to Dadu. When Munni was in hospital, she came to know that her daughter Shahanaz has also expired. On the basis of her said FIR, offence vide Crime No. 38 of 2015 came to be lodged for the offence punishable under Sections 302, 307, 323 and 504 read with Section 34 of the Indian Penal Code.

3. It appears that dead body of Dadu was also brought to the hospital and thereafter inquest panchnama of both the dead bodies was conducted and both the dead bodes were sent for postmortem. After the postmortem was carried out, the clothes on the person of the deceased came to be seized by drawing two separate panchnamas. Panchnama of the spot came to be executed after it was shown by Munna Bhika Manjre to the Police and panchas. Accused Nos. 1 and 2, while in police custody, gave memorandum on 10th April 2015 and discovered the iron rod and stick from a well and a pond respectively, in quick succession. The memorandum panchnama to that effect was executed. The clothes of the accused came to be seized. The photographs of

the spot were taken. Statements of the witnesses were recorded. Postmortem reports and injury certificates came to be collected and after the investigation was over, charge-sheet was filed against both the accused persons.

4. After committal of the case, the prosecution has examined in all thirteen witnesses to bring home the guilt of the accused, after both the accused claimed to be tried. The accused persons have examined DW-1 Gajanan Deshmukh, a press reporter who was then working for a TV channel, who had allegedly taken interview of the informant as well as PW-13 API Badrinath Sanap, for the TV channel he was working. After considering the evidence on record and hearing both the sides, the learned trial Judge has held that the prosecution has proved that accused No.1 only has committed murder of Dadu and accused No.2 has committed an offence under Section 304 Part II of the Indian Penal Code in respect of death of Shahanaz. Offence of attempting to commit murder of informant Munni was found to be proved only against accused No.1. Accused No.1 has been sentenced to suffer imprisonment for life and to pay fine of Rs.5000/-, in default to suffer rigorous imprisonment for one year for the offence punishable under Section 302 of the Indian

Penal Code. Accused No.1 has been further sentenced to suffer rigorous imprisonment for five years and pay fine of Rs.1000/-, in default to suffer rigorous imprisonment for six months for committing offence punishable under Section 307 of the Indian Penal Code. Original accused No.2 has been sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.2000/-, in default to suffer rigorous imprisonment for six months for committing offence under Section 304 Part II of the Indian Penal Code. The substantive sentences were directed to run concurrently. It will not be out of place to mention here that present Appeal has been filed only by original accused No.1 and therefore, the appreciation of evidence is expected to be done only in respect of the evidence that is against accused No.1.

5. It has been vehemently submitted on behalf of the appellant that the learned trial Judge has not appreciated the evidence properly. PW-1 Munni is the only eye witness who has been examined in the case when as per the prosecution story the incident had taken place in front of a *Dhaba* and many people gathered at the said place. Though PW-7 Police Constable Anil Waghmare, who is stated to have witnessed the incident has been examined, but he has turned hostile to the extent that he

witnessed the incident. He has only stated that he reached the spot after the incident had taken place and then had given a phone call to the control room informing the incident. In spite of the fact that he being the Government servant, he has turned hostile and his cross-examination by the learned APP has not yielded any positive impact on the prosecution story. Thus the prosecution story relies on the sole eye witness who is definitely interested, as deceased Dadu was her brother-in-law and deceased Shahanaz was her daughter. Learned Advocate relied on the decision in ***Mani Ram vs. State of Uttar Pradesh, 1994 DGLS (SC) 531***, wherein it has been held that when evidence of sole eye witness is inconsistent with medical evidence then conviction cannot be raised of the evidence of such sole eye witness.

6. It has been further submitted on behalf of the accused – appellant that PW-9 Dr. Rachana is the autopsy doctor and she has given the nature of injuries sustained by both the deceased. In her cross-examination, she has admitted that the injuries noted on the person of Dadu as well as Shahanaz were possible by fall from the motorcycle if the motorcycle is dashed by car from back side. The suggestions those were given to PW-1

Munni, and the statement of the accused under Section 313 of the Code of Criminal Procedure wherein he has also given a written say, shows that the defence that was taken, was that accused was proceeding from the said road in car and he was driving the four wheeler. When appellant was climbing the Ghat section in Kalgaon, one truck came from the opposite direction, due to which he lost his control over the car and gave dash to the motorcycle going ahead of him. As a result of which those persons were thrown from the motorcycle and they sustained injuries. He stopped the vehicle but as people started gathering, appellant took his car and went towards Hingoli. Therefore, it might be that the present appellant was accepting a fact that the car driven by him had given dash to Dadu but certainly he had no intention to kill him or any other person travelling by the motorcycle. The prosecution had not ruled out the possibility of accidental death and accidental injuries to the informant and therefore, the Judgment by the learned trial Judge is perverse. In his cross-examination PW-13 API Badrinath Sanap has claimed ignorance that he had given interview to DW-1 Gajanan wherein he has stated that it was an accident. The information that was given to the Police Station and the station diary entry Exhibit-77 states that it was an accident. DW-1 Gajanan has

stated that he had covered the case of accident-cum murder dated 8th April 2015 and had taken interview of PW-13 API Badrinath Sanap. He had also taken interview of injured lady i.e. PW-1 Munni. Therefore, it appears that an accidental case has been intentionally given colour of murder only on the basis of testimony of PW-8 Munna Manjre, who is the brother of deceased Dadu. PW-1 Munni in her FIR as well as in her cross-examination admits that PW-8 Munna was present when she gave FIR, therefore, the Appeal deserves to be allowed.

7. Per contra, the learned APP supported the reasons given by the learned trial Judge and submitted that the postmortem reports Exhibit-55 and 68 and the testimony of PW-9 Dr. Rachana would certainly show that they had many external injuries and corresponding internal injuries. It has been stated that those injuries were possible by weapon like stick and iron rod to deceased Dadu. Whereas, as regards Shahanaz is concerned, she had sustained about nine injuries. Those injuries were stated to be possible by lifting and throwing her on ground. No doubt the case of the prosecution is depending on the testimony of sole eye witness PW-1 Munni, but it can be seen that she was not even knowing the accused persons prior to the

date of incident. The accused persons were immediately nabbed as PW-7 Police Constable Waghmare had informed the number of the car immediately to the control room and the car was intercepted and the accused were brought. They were immediately identified by the informant. The accused persons have then discovered the weapons used in the commission of the crime and the said memorandum panchnama has been duly proved by examining PW-2 Khanderao Pote. As regards the defence witness is concerned, he himself has stated that it was an accident-cum murder case and therefore, even if initially the picture was like of regular accident, yet if the dash is intentional, then the said accident would amount to murder. No fault therefore, can be found in the appreciation of the evidence by the learned trial Judge. The Appeal, therefore, deserves to be dismissed.

8. Here we would like to start the discussion with the medical evidence. PW-9 Dr. Rachana Sonune is the autopsy doctor who conducted the autopsy on both the dead bodies. She found in all six external injuries on the person of Dadu with corresponding two internal injuries, - (1) Under scalp hematoma on left temporal region admeasuring 3 X 4 cm., (2) Fracture of left

temporal bone 8 cm. in length. Bone fragment missing over left temporal region. She has stated in examination-in-chief that afore-stated injury Nos. 1 and 2 of fracture and internal injury to brain were sufficient to cause death in ordinary course of nature. The injuries were homicidal in nature. After the seizure of weapons i.e. stick and iron rod, those were sent to her and after examining those weapons, she has opined that the injuries found on the person of Dadu were possible by those weapons. Said opinion is at Exhibit-57. The weapons were shown to her in the Court also and she maintained the said opinion. However, in her cross-examination, PW-9 Dr. Rachana has stated that injury Nos.1 and 2 found on the dead body of Dadu might be also possible by stick, article No.2. Those injuries were possible if the person lying on the ground facing to sky and was hit by article Nos.1 and 2. PW-9 Dr. Rachana also says that injury Nos.1 and 2 are possible if a motorcycle rider falls on hard surface due to dash by a car to his motorcycle from back side. Thus, she was not firm as to whether those injuries were homicidal or accidental because she has admitted the suggestion in respect of accidental injuries also. She also says that external injury Nos.3 to 6 found on the person of Dadu are possible by vehicular accident. As regards examination of dead body of Shahanaz is

concerned, Dr. Rachana has noted nine external injuries and she has stated that the death of Shahanaz was due to hemorrhagic shock with multiple injuries. Those injuries were possible by lifting and hitting on ground. However, in her cross-examination PW-9 Dr. Rachana has stated that injury No.1 found on the person of Shahanaz was possible by fall from motorcycle if the motorcycle is dashed by a car from back side. Rest of the injuries found on the person of Shahanaz were also possible in vehicular accident. Thus, her cross-examination shatters her opinion given in examination-in-chief. Here, we would like to say that when such type of injuries would be there on the dead body, then the prosecution should rule out the possibility of accidental injuries in order to conclusively prove that those injuries were homicidal in nature. Therefore, *per se* the postmortem reports and the opinion given by PW-9 Dr. Rachana does not conclusively establish the death of Dadu and Shahanaz as homicidal only.

9. At this stage itself, we would also like to consider the testimony of PW-12 Dr. Sunita Patil, who had examined PW-1 Munni around 12.15 p.m. on 7th April 2015 at Civil Hospital, Hingoli. She found contusion and abrasion over upper side of right ad-measuring 15 X 10 cm. superficially on the person of

Munni. The injury was simple in nature and was caused in road traffic accident. Accordingly, she has issued medical certificate Exhibit-63. In clear words in her examination-in-chief itself she has stated that the injury is not possible by stick and iron rod. It is possible by fall from running motorcycle on tar road. The medico legal certificate Exhibit-63 clearly states that the history as "RTA" (Road Ttraffic Accident) within 1-2 hours. We fail to understand as to how the same act i.e. giving dash of the car to the motorcycle would amount to road traffic accident to PW-1 Munni only. No doubt even the prosecution story starts with the fact that the dash was given by the car to the motorcycle and as a result of the same all the three occupants of the motorcycle fell down on the ground. That means it was an accident at that point of time. But then as per the testimony of PW-1 Munni, accused No.1 assaulted Dadu with crowbar / sabal / iron rod and by original accused No.2 by stick and thereafter when informant had tried to intervene, she was also assaulted by stick and crowbar / sabal. But the medical evidence, as regards her injuries are concerned, is negative, as aforesaid in the examination-in-chief itself in the testimony of PW-12 Dr. Sunita. Therefore, here it is a clear case of variance between the oral evidence and the medical evidence. Now the question would be,

which evidence would then prevail. Definitely it is the normal rule that the ocular evidence would prevail but it comes with the tag. Unless the said oral evidence is convincing / trustworthy, it cannot be relied for convicting a person. Therefore, we proceed to scan the oral evidence.

10. PW-1 Munni, in her examination-in-chief has reiterated the contents of her FIR, which has been already reproduced in Paragraph No.2 herein above, and therefore, we refrain ourselves from reproducing it again. The fact that is coming on record in her testimony, gives a picture that she was not knowing both the accused prior to the incident. She claims that as Dadu called the names of accused persons, she came to know about those names. But her examination-in-chief is totally silent as to when Dadu was charged with the murder of appellant's father and when there was acquittal. The acquittal of Dadu has been projected as the motive to commit crime. Therefore, the prosecution ought to have shown the proximity between the two incidents. It is to be noted that she says that from Kanhergaon Naka a golden colour car was chasing them and the incident has taken place near village Kalgaon. How much distance they had covered, has not been told by her. But if we go by her FIR, she

has stated that they were near Kanhergaon Naka around 9.00 to 9.30 a.m. and the incident had taken place at 11.00 to 11.30 a.m. Whether she wanted to say that for about 2 to 2 ½ hours the car was chasing them and they had not noticed it at all or had not thought that the car was chasing with some ill intention, is a mystery. Here itself we would like to say that though PW-1 Munni – the sole eye witness has stated that even accused No.2 had assaulted Dadu with stick, yet the trial Court has acquitted accused No.2 from the charge of committing murder of Dadu. Further, even when she says that both the accused had assaulted her with stick and iron rod, accused No.2 has been acquitted of the offences punishable under Section 307 of the Indian Penal Code. There is no Appeal by the prosecution to challenge the said acquittal. The same evidence against two accused persons cannot be read differently against them.

11. In the cross-examination PW-1 Munni has stated that both the accused had assaulted her and the accused beaten Dadu when he was lying on the ground. According to her the incident might have lasted for about half an hour. If that would have been so, the severity in the injuries would have been different. She

has clearly stated that many persons assembled after they were assaulted, but none of them has been examined.

12. Here it is to be noted that accused No.1 has put a defence that his car was behind the motorcycle of the deceased and when a truck came from the opposite direction, accused lost his control over the car and the car dashed the motorcycle and then the persons on the motorcycle fell down on the ground and sustained injuries. This suggestion has been denied by PW-1 Munni. The prosecution has to stand on its own feet and in order to prove the offence beyond reasonable doubt, the prosecution cannot take help of the defence. The accused is entitled to take as many alternative defences he / she can but in order to prove the offence beyond reasonable doubt, the prosecution has to establish the facts cogently, conclusively on the basis of trustworthy evidence. When the witness has denied the suggestion in respect of defence, we need not go to that aspect but certainly there appears to be support to the defence that was taken, as aforesaid, in the medical evidence.

13. In the cross-examination PW-1 Munni has stated that PW-8 Munna is the brother of deceased Dadu. Munna met her in

Government hospital, Hingoli and he was there till filing of the report. Her brother had also come to the hospital and therefore, it was tried to be suggested by the defence that Munna has converted the incident of accident in the case of murder. Under the said circumstance, we are also required to go through the testimony of PW-8 Munna.

14. PW-8 Munna Manjre was not present at the time of accident and therefore, whatever he has stated in examination-in-chief is hear say evidence. However, in his examination-in-chief he has added that he himself and his two brothers including deceased as well as their uncle Ganga Hira Manjre were charged for murder of father of Azhar. They were convicted by the Court at Washim but were acquitted by the High Court. In examination-in-chief he has intentionally not given the date when they were acquitted. But in the cross-examination he has stated that the High Court acquitted them in the year 2012. We could find the copy of the Criminal Appeal No.607 of 2006 decided by this Court, Bench at Nagpur on 16th April 2012, which appears to be the Appeal filed by the deceased Dadu, PW-8 Munna and other two accused persons, to challenge their conviction by Washim Court and by the said Judgment they were

acquitted. Here the incident has taken place on 7th April 2015. That means almost three years thereafter the incident has taken place. Whether the said acquittal then can be stretched for three years to consider as motive for committing murder. Therefore, the motive also appears to be shaky and not clear. There was no motive for allegedly murdering Shahanaz. As aforesaid, Shahanaz was stated to be lifted by accused No.2 and thrown on the ground. PW-1 Munni has not stated how accused No.2 had lifted Shahanaz and then thrown on the ground. Of course, we do not want to go into the said aspect further as only accused No.2 was held guilty, that too, for committing offence punishable under Section 304 Part II of the Indian Penal Code for the said death of Shahanaz. But we have taken the said aspect to consider the point of motive.

15. PW-7 Police Constable Anil Waghmare has deposed that he had gone to Kalgaon due to the illness of his father. When he reached near Kalgaon Pati, people assembled there at the spot of incident and therefore he halted. People told him that vehicle has dashed (गाडीने उडवले). Some persons were also saying that persons from Maruti car had beaten those persons by tommy. Then he contacted Hingoli Police Control Room and gave an

information. He had also given the number of Maruti car, as the number plate was lying at the place of incident and also the man i.e. Dadu. He has categorically denied in the examination-in-chief also that he has witnessed the incident. Thereupon, by seeking permission, questions in the nature of cross-examination were put to this witness and then nothing favourable to the prosecution could be extracted from the questions put by the learned APP. No doubt the further rituals under Section 154 of the Evidence Act have been followed. But here interestingly it has not been pointed out that the prosecution has taken any action against this witness for perjury. Rather his testimony could find support in Exhibit-77, the station diary entry with Hingoli Rural Police Station, which is on the basis of information received on Mobile Phone of Police Constable Bhalerao regarding accident. That means the Control Room appears to have informed the said fact to Police Constable Bhalerao. This is one of the circumstance going in favour of the appellant.

16. Prosecution has failed to examine the independent, passers by to support the prosecution story. However, PW-5 Dr. Vijay Ingle, who was travelling from the Ambulance, has been examined. He reached the spot after the incident. He was

signaled by the persons assembled at the spot. He checked Dadu and found him to be dead but the girl and woman were alive and therefore, they were taken in Ambulance. He put injured girl on oxygen. He says that woman was crying and saying that they were beaten. Important point to be noted is that he gives that statement but with no further details. Therefore, the said statement cannot be taken as supporting the prosecution. Even PW-1 Munni has not stated that the doctor from the Ambulance asked her about the history and she had told the same to him.

17. The prosecution is also relying on the discovery panchnama. It has been tried to be proved through PW-2 Khanderao Pote. Even if for the sake of arguments it is accepted that the said discovery is by both the accused, yet prosecution failed to establish connection between the discovered iron rod to the injuries sustained by Dadu and PW-1 Munni, for the reasons aforesaid.

18. It can be certainly said from the testimony of PW-13 API Badrinath Sanap that he has not investigated the matter in proper perspective. He has not tried to find out the proximity between the decision of acquittal of the deceased and the

incident and the time gap. In fact no documents in respect of that crime were collected by him. Here the injuries sustained by PW-1 Munni were simple in nature. She was not prevented by any reason from showing the spot of incident, yet at the time of spot panchnama, the investigating officer has taken PW-8 Munna with him. The investigating officer PW-13 API Badrinath Sanap has claimed ignorance about giving an interview to a TV Channel in respect of this incident. PW-13 Sanap himself has recorded the FIR Exhibit-31. If we peruse Exhibit-31, it is shown that the certificate from medical officer, Civil Hospital, Hingoli has been taken regarding the consciousness and orientation of the patient i.e. PW-1 Munni and it is stated in Exhibit-31 that it is recorded in the Government Hospital, Hingoli. Still, in the FIR it is stated that when informant was giving the statement, two persons were produced before her and made her to identify and thereupon their names have been recorded in the FIR. We fail to understand, what kind of procedure is then adopted. PW-13 API Sanap had no authority to take the accused persons to Government Hospital, show them to the informant, get them identified and then include their names in the FIR. This shows that investigating officer acted with some vested interest.

19. As aforesaid, the case of the prosecution is based on sole eye witness and there are so many lacunas those have been left by the prosecution in leading the evidence. The learned trial Judge has not appreciated the evidence properly and the conclusion has been drawn, which has caused prejudice to the accused – appellant and therefore, the Appeal should succeed. The prosecution had failed to prove that only accused – appellant had committed murder of Dadu and he is the only assailant who had tried to commit murder of Munni, beyond reasonable doubt. The injuries sustained by PW-1 Munni were simple in nature and only on the basis of her testimony it cannot be said that the dash was given with an intention to kill thereby attracting offence under Section 307 of the Indian Penal code and therefore the Appeal deserves to be allowed. Hence, while setting aside the impugned Judgment to the extent of present Appellant, we pass following order:-

ORDER

(I) Criminal Appeal stands allowed.

(II) The conviction awarded to the appellant - Azhar Abdul Pappuwale by learned Additional Sessions Judge, Hingoli in

Sessions Trial No.21 of 2015 on 16th November 2017 for the offence punishable under Sections 302, 307 of the Indian Penal Code stands set aside.

(III) The appellant stands acquitted of the offence punishable under Sections 302, 307 of the Indian Penal Code.

(IV) Appellant be set at liberty, if not required in any other case.

(V) The fine amount deposited, if any, be refunded to the appellant after the statutory period.

(VI) We clarify that there is no change as regards the order in respect of disposal of Muddemal.

(VII) In view of the disposal of the Appeal, Criminal Application also stands disposed of.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE